8-1900-5482-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

State of Minnesota, by
John Lennes, Commissioner,
Department of Labor and Industry,

Complainant,

vs

Jansteel, Inc. and
Wyman Haberer, individually,
and Douglas Kaufman, individually,

Respondents.

ORDER ON MOTION FOR SUMMARY DISPOSITION

The above-entitled matter is pending before the undersigned Administrative Law Judge pursuant to a Notice of and Order for Hearing and a Complaint filed with the Office of Administrative Hearings on April 15, 1991 . On July 16, 1991 , the Respondent filed a Motion for Summary Judgment. On August 2, 1991 , the Complainant filed its response to the Motion. Because neither party requested an opportunity to present additional argument, the record closed when the Complainant's objections to the Notion were filed.

John K. Lampe, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, has appeared on behalf of the Complainant. Frank J. Brixius and Richard A. Williams, Jr. , Hvass, Weisman & King, Chtd , Attorneys at Law, Suite 450, 1 00 South Fifth Street , Minneapolis , Minnesota 55402, have appeared on behalf of the Respondents.

Based upon all of the files, records and proceedings herein, and for the reasons set forth in the Memorandum hereto attached,

IT IS HEREBY ORDERED: That the Respondent's Motion for Summary Judgment be and is hereby DENIED.

Dated this3rd day of September, 1991.

JON L. LUNDE
Administrative Law Judge

MEMORANDUM

The Complaint in this matter is based on a discrimination charge filed with the Minnesota Department of Labor and Industry (Department). In his Complaint, the Commissioner has charged that the Respondents fired two employees, Frank Higgins and Lester Patchen, because they complained about the Respondent's failure to provide certain safety equipment at no cost to the employees in violation of Minn. Stat. sec. 182.654, subd. 9 (1990). The statute prohibits discharges and other forms of discrimination relating to an employee's exercise of rights under the Minnesota Occupational Safety and Health Act of 1973 (Act). It states:

> No employee shall be discharged or in any way discriminated against because such employee has filed any complaint or instituted or caused to be instituted any proceeding or inspection under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of the employee or others of any right afforded by this chapter. Discriminatory acts are subject to the sanctions contained in section 182.669.

Procedures for resolving alleged violations of the statute are contained in Minn. Stat. 182.669, subd. 1, which states, in part:

> Any employee believed to have been discharged or otherwise discriminated against by any person because such employee has exercised any right authorized under the provisions of sections 182.65 to 182.674, may, within thirty days after such alleged discrimination occurs, file a complaint with the commissioner [of Labor and Industry] alleging the discriminatory act. Upon receipt of such complaint, the commissioner shall cause such investigation to be made as the commissioner deems appropriate. If upon such investigation the commissioner determines that a discriminatory act was committed against an employee the commissioner shall refer the matter to the office of administrative hearings for a hearing before an administrative law judge pursuant to the provisions of chapter 14 . . . .

I.

The Respondents seek summary judgment with respect to Lester Patchen's charge on the grounds that Patchen did not file a complaint with the Department within the 30-day period contained in Section 182.669, subd. 1, and that the Commissioner's complaint with respect to him must be dismissed for lack of jurisdiction. Summary judgment is available in a contested case proceeding under Minn. Rule pts. 1400.5500 K. and 1400.6600 (1991). Under the latter rule, the standards governing summary disposition in a contested case are the same as the standards in Rule 56, Minn.R.Civ.P. Under the civil rule, summary judgment is appropriate when the moving party shows that there is no

genuine issue of material fact and that the movant Is entitled to judgment as a matter of law.

It appears to be undisputed that Higgins and Patchen were discharged from their employment with the Respondent, Jansteel, Inc. (Jansteel), on July 8, 1988. Three days later, on July 11, Patchen, Higgins and another former employee of the Respondent's went to the Department's offices to complain about their discharge by Respondents. They were interviewed in Luther Jones' office. Jones is an area supervisor in the Department's Occupational Safety and Health Division. Among other things, Jones is responsible for conducting screening interviews of employees claiming that they have been discriminated against for exercising rights under the Act. At the interview, Jones determined that further investigation of their complaints was warranted, and he completed and signed a departmental "Discrimination Complaint" form and certified that a complaint had been filed that day. Jones Affidavit, at 1-2. The Discrimination Complaint form lists all three men as complainants, but was signed by Higgins only. Ex. G.

Because Patchen did not sign the Discrimination Complaint executed on July 11, 1988, or any other complaint within the thirty-day period set forth in 182.669, subd. 1, Respondents argue that the Commissioner has no jurisdiction to decide Patchen's claim and that Respondents are entitled to summary judgment regarding that claim. Complainant argues that Patchen did not have to sign a complaint in order to initiate an action under Minn. Stat. 182.669, subd. 1.

Although neither party referred to them, the starting point for determining whether Patchen filed a timely complaint is the rules promulgated by the Department to implement section 182.669. The rules governing employee discrimination are contained in Minn. Rule pts. 5210.0200-5210-0340 (1987). Claim procedures are set forth in Part 5210.0310 (1987) which states as follows:

> Subpart 1. Who may file. A complaint alleging discrimination under Minnesota Statutes, sections 182.654, subdivisions 9 and 11, and 182.669 may be filed by an employee or an authorized employee representative.
>
> Subp. 2. Time for filing. The complaint must be filed, either orally or in writing, with the commissioner of the Minnesota Department of Labor and Industry within 30 days after the alleged discriminatory act occurred.

Subp. 3. Form of filing. Verbal complaints must be reduced to written form by the Department of Labor and Industry and sent to the complainant for signature. The form must be signed and returned to the department within 15 days of receipt by the complainant. Upon receipt of the signed complaint, the commissioner will make an investigation as he deems appropriate. If the complainant fails to sign and return the written statement within the 15 days, the case shall be closed.

> Subp. 4. Notice of commissioner's determination. The commissioner shall notify the complainant of the commissioner's determination regarding the complaint within 90 days of receipt of a signed complaint.

The words "authorized employee representative" are defined in Minn. Rules pt. 5215.0200 to mean "a labor organization that has a collective bargaining relationship with the cited employer and that represents affected employees. it also means a person authorized to act on behalf of affected employees." There is no evidence in the record indicating that Higgins was not authorized by Patchen to sign the discrimination complaint in his behalf and summary judgment should be denied on that ground.

Even if Higgins was not Patchen's authorized employee representative for purposes of filing the discrimination complaint, part 5210.0310, subp. 2, authorizes a verbal complaint.l/ Clearly, Patchen made a timely verbal complaint when he went to Jones' office to complain about his discharge. The verbal complaint he made was reduced to written form by Jones, but it was never sent to Patchen for signature as required by the rule. However, Respondent has not argued that the complaint should be dismissed for that reason or that the Department's failure to comply with the procedure set forth in subp. 3 of the rule have been prejudicial to it.

Minn. Stat. 182.664, subd. 9, and 182.659 are patterned after section 11(c) of the federal Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c)(1) and (2). The courts have held that the 30-day period prescribed in federal statutes for filing a discrimination claim is like a statute of limitations and is subject to equitable tolling. Donovan v. Hahner, Foreman & Harness, Inc. 736 F.2d 1421, 1984-1985 OSHD 1 26,937 (10th Cir. 1984). The "defect" in the timeliness of Patchen's complaint, if any, is that it has not been signed even though several years have elapsed since the complaint was filed with the Department. However, as was mentioned above, there is no statute or rule which requires that the complaint be signed within 30 days. Even if Patchen's signature was necessary, there is nothing which prevents him from signing the discrimination charge now. As a general rule, formal or technical defects in pleadings, such as a failure to sign or verify them, are amendable. 71 C.J.S., Pleading, 284a. Such amendments ordinarily relate back to the date of the original pleading. Id., 320b.

In decisions under Title VII of the Civil Rights Act of 1964, the courts

have held that the failure to file a verified charge of discrimination within applicable time periods does not permit dismissal of the charges if amended to add the verification. See, e.g., Weeks v. Southern Bell Telephone Co, 408 F.2d 228 5th Cir. 1969); Casavantes v. California State Univ. 732 F.2d 1441, 34 F.E.P. 1336 (9th Cir. 1984); EEOC v. Calumet Photographic, Inc 687 F.Supp. 1249, 47 F.E.P. 42 (N.D.Ill. 1988); Peterson v City of Wichita,

I/ In Power City Electric, Inc., 1977 OSHD 1 23,947 (E.D.Wash. 1979), the court held that the word "filed" as used in section 11(c) is synonymous with "lodged" and that verbal complaints of discrimination are authorized. The Department's rule implementing section 182.659 is consistent with this holding.

888 F.2d 1307, 51 F.E.P. 525 (10th Cir. 1989), cert. denied, 110 S.Ct. 2173 (1990) . Moreover, when a party filing a discrimination claim under Title VII relies on the EEOC for correct procedures and is not apprised of the formalities of verifying his statement, the employee's charge is not dismissed. Stewart v. Core Laboratories, 460 F.Supp. 931, 24 F.E.P. 418 (N.D.Tex. 1978). When a government agency does not properly process a discrimination charge under Title VII, dismissal is not appropriate because the charging party is not at fault. Watson v. Gulf & Western Indus,, 650 F.2d 990, 26 F.E.P. 1180 (9th Cir. 1981). Under these precedents, the Administrative Law Judge is persuaded that Patchen's charge should not be dismissed as untimely merely because the Department failed to have him sign the Discrimination Complaint.

The Respondents have also moved for summary judgment on the grounds that the complaints made by Higgins and Patchen are not protected activities under Minn. Stat. 182.654, subd. 9. In the Respondent's view, the complaints allegedly made by Patchen and Higgins did not involve safety but involved money; i.e., whose money would purchase safety glasses and shoes. In order to determine if Higgins and Patchen engaged in protected activities, it is necessary to review the transcripts, affidavits and other material on file herein as well as the language of relevant statutes and relevant court decisions.

Frank Higgins' employment with Respondent began November 16, 1987. Lester Patchen's employment with Respondent began December 4, 1987. Higgins was a yard supervisor responsible for inventory control. Patchen was a parts cutter and truck driver. Both had received regular pay increases during the course of their employment. Higgins got his last raise in pay on May 16, 1988, and Patchen received his last raise in pay on June 4, 1988.

At a shop meeting on July 6, 1988, called by Jansteel's newly-hired foreman, Doug Kaufman, Higgins and Patchen complained about safety glasses and safety shoes, arguing that the Respondent was required to provide them to employees cost free. Kaufman told them he would talk with the Respondent's owner, Hyman Haberer, about the matter and get back to them the next day. On

July 7, Kaufman told Higgins and Patchen that Jansteel would pay $10.00 twice each year for safety shoes but would not pay anything toward prescription safety glasses. Patchen and Higgins both told Kaufman that the Respondent's proposal was wrong. The next day when they reported to work, the two men were fired. Both of them believe that they were fired because they complained about the Respondent's refusal to provide safety glasses and safety shoes to employees. See Affidavits of Higgins and Patchen. When they were discharged, they were told that their termination resulted from tardiness, displaying a bad attitude and creating bad morale. Ex. G. Respondents deny that issues relating to safety glasses and safety shoes resulted in the employee's discharge. However, there clearly are disputed issues of fact as to the reasons for the employees' discharge.

Respondents argue that even if the two employees' complaints about Jansteel's obligation to provide safety shoes and safety glasses to them was a substantial factor in the decision to discharge them, their complaints must be dismissed because economic issues are not protected activities under Minn. Stat. 182.654, subd. 9.

There Is no doubt that an employee's complaints to an employer regarding safety issues are protected activities under the federal OSH Act. In construing the federal act upon which 182.654, subd. 9 is based, It has been held that safety and health related complaints made to an employer are protected activities. See, e.g., Donovan v. Commercial Sewing, Inc.. 562 F.Supp. 548 (D.Conn. 1982); Marshall v. Springfield Poultry Farm, Inc., 445 F.Supp. 2; 1977-1978 OSHD 1 22,107 (M.D.Pa. 1977). The courts have even held that oral complaints to an employer regarding safety hazards are protected. Power City Electric Inc. 1977 OSHD 1 23,947 (E.D.Wash. 1979). The Department's rules do not specifically recognize that employee complaints to an employer are protected activities as federal regulations do.2/ but given the broad and remedial purpose of the Act, which mandates a liberal construction, both oral or written complaints to an employer must be deemed to be protected. Bohn v. Cedarbrook Engineering CQ., 422 N.W.2d 534, 536 (Minn. Ct.App. 1988), review denied.

Not all complaints to an employer are protected, however. Only complaints "under or related to" chapter 182 are protected. Therefore, it must be determined if a complaint regarding the provision of safety shoes and safety glasses at an employer's expense is "under or related to" the statute. In 1 1980 OSHD 1 24,332 (D.Neb. 1980), the court found that a refusal to work based on pay received for the work rather than safety factors was not a protected activity and that employees who refused to work for pay reasons were not discriminated against when they were discharged. In that case, the employees offered to work if paid at a higher hourly rate, but never complained to the employer about safety conditions or made a good faith effort to get the employer to correct dangerous working conditions prior to the time they were discharged. Safety issues were not raised until after the employees were discharged.

In this case there is little or no evidence that Higgins or Patchen were discharged for complaints regarding unsafe working conditions. On the contrary, their complaints related to the employer's failure to pay for their safety shoes and safety glasses. This is more of an economic issue than a safety issue. However, some economic issues are protected under Minn. Stat. 182.655, subd. 10a, which provides in part:

> Where appropriate, standards shall prescribe suitable protective equipment, if feasible engineering and administrative methods of protection alone do not provide adequate protection, and this equipment shall be made available by and at the cost of the employer.

In Bohn v. Northwest Airlines Inc , 435 M.W.2d 612, 615 (Minn. Ct.App. 1989), the court held that under the cited statute an employer must pay for safety equipment if there is a standard that specifically prescribes that equipment. Because no standards prescribe safety shoes for airline employees, the court held that Northwest was not required to pay for safety shoes even though it required its employees to wear them.

2/ 29 C.F.R. 1977.9(c) (1990).

Similar results have been reached in other cases. The general industry standard in 29 C. F. R. 1 910. 132 (a) requires, among other things, that personal protective equipment for employees' eyes and extremities be "provided, used and maintained" in a sanitary and reliable condition. The Federal Occupational Safety and Health Review Commission held that this standard did not require employers to provide and pay for foot protection. The Budd CD.. 1973-1974 OSHD 1 17,387 (1974). The Commission concluded that the prescription of cost allocations is not essential to effectuate the purpose of the federal OSH Act's objectives and that it is irrelevant who pays for such equipment. In the Comnission's view, such issues should be resolved in collective bargaining. The Commission suggested, however, that the provision of nonpersonal equipment may have to be provided by an employer, but that an employer would not have to provide uniquely personal equipment. Id. at 21,915 n5. This decision was affirmed on appeal. Budd Co. v. OSHRC, 513 F.2d 201, 1974-1975 OSHD 1 19,496 (3rd Cir. 1975). Accord: Arkansas-Best Freight System, Inc. v. OSHRC, 529 F.2d 649, 1975-1976 OSHD 1 20,354 at 24,282 n7 (8th Cir. 1976). The Complainant has pointed to no standard which requires the Respondent to provide safety shoes to its employees at the Respondent's cost.

The Complainant also did not point to any standard which requires the Respondent to provide safety glasses to its employees at the Respondent's cost. However, at least one standard may require that the Respondent do so. 29 C.F.R. 1910.133(a) states, in part:

> (1) Protective eye and face equipment shall be required where there is a reasonable probability of injury that can be prevented by such equipment. In such cases, employers shall make conveniently available a type of protector suitable for the work to be performed, and employees shall use such protectors. No unprotected person shall knowingly be subjected to a hazardous environmental condition. Suitable eye protectors shall be provided where machines or operations present the hazard of flying objects, glare, liquids, injurious radiation, or a combination of these hazards.
>
> (3) Persons whose vision requires the use of corrective lenses in spectacles, and who are required by the standard to wear eye protection, shall wear goggles or spectacles of one of the following types:

i. Spectacles whose protective lenses provide optical correction.

ii. Goggles that can be worn over corrective spectacles without disturbing the adjustment of the spectacles.

Under this standard, employers are required to provide employees with necessary eye protection. Florida Machine & Foundry, Inc. V. OSHRC, 693 F.2d 119, 1982 OSHD 1 26,335 (11th Cir. 1982).

it appears, therefore. that employers are sometimes required to provide safety equipment at the employer's cost. No standards were cited by Complainant showing that the Respondent is required to provide steel-toed shoes or that it is required to provide prescription spectacles when it makes safety goggles or glasses available. Safety shoes and prescription spectacles are of a very personal nature and can be used off the job. In that respect they are different from other types of safety equipment. In this case it appears that the employees' alleged belief that the Respondent was obligated under the Act to provide safety shoes and safety prescription spectacles at the employer's cost was erroneous. It does not follow, however, that the complaints they made do not arise "under" the Act. Assuming that the employees were correct in their belief, their complaint certainly would arise under the Act. The Administrative Law Judge is not persuaded that an employee's right to complain about the proper allocation of the cost of safety equipment should depend on whether the employees' beliefs regarding the employer's obligations must be accurate in order for their complaints to be protected. Such a conclusion would have a chilling affect upon the exercise of rights granted to employees under the Act contrary to the liberal construction that must be accorded to it. In addition, cost factors may be related to safety because employees may be reluctant to purchase safety equipment if they must pay for it themselves. When the employer is not required to pay for safety equipment under the Act, employees certainly can attempt to require the employer to do so under collective bargaining processes. Nonetheless, employees should not be prohibited from raising cost issues when they have a good-faith belief that the employer is not complying with OSHA requirements. Under the circumstances, it is concluded that their complaints were protected, even if their beliefs regarding the employer's obligations are erroneous. Therefore, Respondent is not entitled to summary judgment.

The Respondents' final argument in support of their Motion is that the complaint in this case fails to state a claim as a matter of law. See, Respondent's Memorandum in Support of Motions for Summary Judgment, p. 15. Normally, such motions are brought pursuant to Rule 12.03, Minn.R.Civ.P. However, when matters outside the pleadings are presented to the court such a motion must be treated as one for summary judgment under Rule 12.03 and disposed of as provided for in Rule 56, which relates to motions for summary judgment.

on a Motion for Summary Judgment, the moving party carries the burden of proof to establish that no genuine issue of material fact exists. See, e.g., Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988). When the nonmoving party carries the burden of persuasion at trial, the moving party's burden on motion for summary judgment can be met by explaining the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, admissions or affidavits which it believes demonstrate the absence of a genuine issue of material fact. The moving party in such case is not required to support its motion with affidavits or other similar materials

negating the opponent's claim. Calotax Corp. v. Catratt, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). When the nonmoving party bears the burden of proof at trial, the moving party on a motion for summary judgment can meet its burden by merely pointing out that "there is a absence of evidence to support the nonmoving party's case." Id., 106 S.Ct. at 2554. In Celotex, the court also stated:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment. after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard (for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . ." Anderson v. Libertv Lobbv. Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

Accord: Carlisle V. City of Minneapolis, 437 N.W.2d 712 (Minn. Ct. App. 1989).

Hence, summary judgment may be entered against the party who has the burden of proof at trial if it fails to make a "sufficient showing" of the existence of an essential element of its case after adequate time to complete discovery. Carlisle, supra, 437 N.W.2d at 715. To meet this burden of producing "sufficient" evidence, the nonmoving party with the burden of proof at trial must offer "significant probative evidence' tending to support its claims. This burden is not met by showing that there is some "metaphysical doubt" as to the material facts. Id. However, the nonmoving party has the benefit of the view of evidence most favorable to it. Concord Co-op. v. Security State Bank of Claremont, 432 N.W.2d 195, 197 (Minn. Ct. App. 1988). Also, all doubts and inferences must be resolved against the moving party. Dollander v. Rochester State-Hosp., 362 N.W.2d 386, 389 (Minn. Ct. App. 1985).

The Respondent's position is that the record fails to show that the employee's activity was a "substantial reason" for the action complained of or that the discharges would not have taken place "but for" their engagement in

protected activity. See, e.g., Granite Groves, A Joint Venture, 1977-1978 OSHD 1 22,126 (D.C.D.C. 1977). In the Respondent's view, evidence in the record is insufficient to support the employees' charges because the allegation that their safety complaints on July 6 led to their discharge on July 8 defies common sense and logic. The Respondents argued that if the motivating factor behind the employees' discharges had been their complaints at the July 6 meeting, they would have been discharged on July 7. Because the employees were late to work on July 7 without notifying the employer, the Respondents argue that the Complainant has ignored the temporal relationship

between the employees discharge, and their tardiness on July 7. Because the employees were not discharged on the 7th, following their complaints at the safety meeting on July 6, but were discharged on July 8, following their tardiness on July 7th, it Respondents argue that the events of July 6 clearly played no role In the decision to discharge them. That argument is not persuasive.

The record contains "significant probative evidence" tending to support the discrimination charges filed. Although both employees were late for work on July 7th, and had been previously been warned about tardiness, the two-day period between the time they made their verbal complaints and their discharges is sufficiently close to raise an inference that their discharges were attributable, in whole or in part, to the complaints they made. Although they were tardy on July 7, the record shows that this tardiness was attributable to one of the employee's illness and that they rode to work together. The record also shows that they voiced dissatisfaction with the employer's response to their complaints on July 7th. Hence, their tardiness on July 7th could have been a mere pretext for their discharges. A discharge occurring shortly after an employee engages in protected activity is relevant evidence. Hence, a Connecticut District Court upheld a discrimination charge against an employer who suddenly fired a worker ostensibly for absenteeism on the day after she made a complaint to OSHA. Commercial-Sewing, Inc., 1982 OSHD 1 26,268 (D.C.Conn. 1982).

The inference of discrimination is strengthened by the fact that the foreman who discharged them was relatively new on the Job, having been working with the employees only since June 20th, that the employees had received regular pay raises and had each recently received such a raise, and the manager's liberality in permitting employees to stay home from work. Also, there is evidence that the employee's discharge was not predicated on tardiness alone but was also based on their "bad attitude" or their adverse affect on employee morale. This evidence clearly suggests that reasons other than tardiness were a substantial reason for their discharge. The mere fact that the employees were tardy on July 7, attributable as it was to one of the employee's illness, does not, as a matter of law, establish that their complaints were not a "substantial reason" for their discharges. For these reasons, and due to the credibility determinations that must always be made in discrimination cases, it is concluded that the Respondent's Motion for Summary Judgment on the apparent grounds that there is not "significant probative evidence" tending to support the claims asserted against them must be denied.

JLL